IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.35 OF 2005

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.

Court's or Judge's orders

Mr.A.S. Desai, for the Petitioners

Mr. Gabriel Pillai with Mr. R.B. Singhvi and Sanjay Singh for Respondent Nos. 1 and 2 and 4 to 6.

Mr. A.H. Palekar, A.G.P. for Respondent Nos. 3 and 7.

CORAM : F.I. REBELLO,J.
DATED : JANUARY 14, 2005

P.C.

. Rule. Heard forthwith.

2. The petitioner is a candidate contesting elections to be held to the petitioner No.1 Society. The present petition is filed to challenge the order of the Appellate Authority whereby the Appellate Authority by the impugned order dated 6th January, 2005 has allowed the Appeal preferred by the Respondent No.1 against the rejection of his nomination for the election to Petitioner No.5 Society.

3. The Respondent No.1 is one of the candidates who filed his nomination papers. His Nomination paper came to be

rejected by the Returning Officer on 23rd December, 2004 on the ground that he is a nominal member. Against that order an Appeal was preferred by the Respondent No..1 on 24th December, 2004. At that time, however, all the candidates contesting the elections were not joined as parties. It is only on 28th December, 2004 that an application was moved to add the said candidates. At the hearing of the Appeal on behalf of the petitioners herein an objection was raised that the Appeal was not properly constituted and that the application for amendment was barred by limitation and, therefore, could not have been entertained and consequently the Appeal ought to have been dismissed. The Appellate Authority, however, held that the various judgments relied upon on behalf of the petitioners herein pertained orders in respect of defeated candidates and as such would not be applicable. In so far as the contention that the nominal member is not eligible considering the provisions of Section 27(a) of the M.C.S. Act which bars a nominal member from voting or being a member of the managing committee , the Appellate Court held that the respondent No.1 had made an application for membership in the year 1998 and had not been informed

about the status and after filing the nomination he was informed that he is a nominal member and that would be of no consequence as he would be a deemed member and allowed the Appeal.

4. On behalf of the Respondent NO.1 learned Counsel points out that the appeal was filed within limitation. Only the application for joining the additional party was made on 28th December, 2004. It was within three working days considering that the order was made available late on 23rd December, 2004. It is further submitted that the respondent No.1 is deemed member and consequently was eligible to contest the elections.

5. At the first instance the Appeal preferred within time limit was without joining all other necessary parties namely other candidates whose nominations were found to be in order. The Appeal, therefore, as filed was not properly constituted. The Application for joinder was filed after the period of limitation. Even if 23rd December, 2004 is excluded three days will end on 26th December, 2004. However, it was filed on 28th December, 2004. The Application for joinder of

necessary parties was beyond the period prescribed. That could not have been allowed and considering that application has to be rejected. Once that be the case, the Appeal, as presented was without necessary parties and as such the Appellate Court could not have granted relief in the Appeal as filed and consequently ought to have dismissed the Appeal on that count alone.

6. Apart from that even assuming that the respondent No.1 was entitled for membership the respondent No.1 to show that he is a deemed member ought to have produced some documentary evidence that he has been admitted as a member. If there be a dispute it was open to the respondent No.1 to have moved either under Section 21 or Section 22 of the M.C.S. Act whichever is applicable for a declaration as member. That was not done. It is not open to the Election Authorities to consider considering their limited jurisdiction to decide whether a person is a deemed member or not. It is only production of a certificate of membership or the name being included in the voters list would that be prima facie evidence of membership. That was also not produced. Section 27-A

clearly bars a Nominal member from being a member of the Managing Committee. The petitioner No.5 has communicated to the Respondent No.1, may be at the time of filing of the nomination, that he was a nominal member. That being be so it was not open to the Appellate Authority to proceed on the footing that the respondent NO.1 is a deemed member and to hold that he was eligible to contest the elections.

7. For the aforesaid reasons the petition will have to be allowed. Rule made absolute in terms of prayer clause (a).

. All parties/Authorities to act on an ordinary copy of this order duly authenticated by the Personal Secretary/Associate of this Court.

(F.I. REBELLO, J.)